

DOCKET FILE COPY ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Inquiry Concerning the Deployment of Advanced
Telecommunications Capability to All Americans
in a Reasonable and Timely Fashion, and Possible
Steps to Accelerate Such Deployment Pursuant
to Section 706 of the Telecommunications Act of
1996

RECEIVED

OCT - 8 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket 98-146

**REPLY COMMENTS OF THE COALITION OF UTAH INDEPENDENT INTERNET
SERVICE PROVIDERS**

Donald Weightman
510 C Street, N.E.
Washington D.C. 20002
(202) 544-1458

William J. Evans
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street
Suite 1800
Post Office Box 45898
Salt Lake City, Utah
84145-45898
(801) 532-1234

Counsel for CUIISP

October 8, 1998

No. of Copies rec'd
List A B C D E

0 29

**REPLY COMMENTS OF THE COALITION OF UTAH INDEPENDENT INTERNET SERVICE
PROVIDERS**

Table of Contents

Introduction and Summary	1
I. The Commission Should Not Permit Emerging Broadband Markets Like DSL To Be Stifled By Monopoly Leveraging.	4
II. Equal Access Must Be Assured, and Not Assumed	4
III. The Risk of Price Squeeze Underlines the Need for Cost-based Pricing of Bottleneck Services	7
IV. Unfair Use of Network Information Must Be Remedied	9
V. The Anticompetitive Use of Joint Corporate Assets Must Be Addressed and Remedied.	10
Conclusion	14

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

OCT - 8 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996

CC Docket 98-146

**REPLY COMMENTS OF THE COALITION OF UTAH INDEPENDENT INTERNET
SERVICE PROVIDERS**

The Coalition of Utah Independent Internet Service Providers ("Utah Coalition"¹) hereby respectfully submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In earlier comments, the Utah Coalition showed how US West Communications, Inc. ("US WEST") has used its control of the local loop to foreclose competition in Digital Subscriber

¹ Coalition members are: ArosNet, Burgoyne Computers Inc., CastleNet, Coastlink, DirecTell, EagleNet Online, Fibernet, I-80, InfoWest, Internet Connect, Internet Technology Systems, inQuo, Konnections, NETConnect, Connect A Net, PCFastNet, PDQ Internet, Redrock Internet, SISNA, Software Solutions, Utah Internet Services, VitrexNet, Vyzynz, Wasatch Communications Group, WebIt!, Web Guy Productions, Western Regional Networks, Xmission, XPressweb.

Line ("DSL") broadband services in Utah. In particular, US WEST has

- denied or delayed access to various components of DSL, to favor itself and its Internet Service Provider ("ISP") affiliate over its competitors;
- exploited its control of network and customer information to give its ISP affiliate a head start over competitors in marketing this new service; and
- jointly marketed the new service so as to favor its affiliate at the expense of competitors.

DSL broadband -- which must necessarily run through US WEST's bottleneck control of the local loop -- is the *only* broadband Internet-related telecommunications service now available in Utah. Because of this structural constraint on the market, and because of US WEST's conduct, the DSL market in Utah is not fully competitive. Hence, any argument from ILECs such as US WEST that DSL and other broadband markets are competitive and, therefore, such markets should be deregulated across the board, must be rejected.

Instead, the Utah Coalition respectfully submits that the following procompetitive relief is necessary and appropriate:

- *First*, for the data transport segment of high speed DSL-based Internet access, the ILECs such as US West must be barred from preventing competing local carriers from serving that segment.

- *Second*, for the Internet access segment of high speed DSL-based information services, ILECs must be barred from any form of discrimination favoring their ISP affiliates in the course of selling telecommunications services (such as xDSL). In the alternative, structural separation requirements should be applied to any ILEC ISP affiliate in any case where the ILEC offers an xDSL service to end users

- *Third*, the Commission should require that cost-based tariffs be filed for DSL services to prevent price squeezes. Also, rules should be developed to proscribe price squeezes, and the rules should provide for prompt and certain enforcement.

These reply comments will address how the market foreclosure outlined above might be helped by rulings on these issues (pending in this and other proceedings). Problems of fair and equal access are open issues in many of these proceedings. Leaving the issues open, however, creates uncertainty and hinders competition in the markets dependent on network access. The Commission should bring these issues to closure.

These reply comments will also rebut certain contentions made in US WEST's comments.

I. The Commission Should Not Permit Emerging Broadband Markets Like DSL To Be Stifled By Monopoly Leveraging.

There is a close relationship between DSL deployment as a telecommunications service, and the competitive market for Internet access. To begin with, the demand for high speed Internet access is the principal force driving DSL deployment. But the relationship also goes the other way. The last mile delivery of high speed Internet access is also dependent upon the ILECs' local loop telecommunications monopoly.

The US WEST suggestion in its Comments (19 et seq.) that "convergence" can and will ensure a competitive market place here and now does not merit serious consideration. In Utah, for example, the technologies have not converged enough to provide an actual, on the ground, competitive substitute for last mile advanced telecommunications delivery. Until such competition is actually available, the Commission should be skeptical as to claims of convergence-as-cure-all. By appealing to potential competition from convergence, US WEST is, in effect, seeking to gain a free hand to choke off actual competitors in emerging broadband-based information service markets.

II. Equal Access Must Be Assured, and Not Assumed

As long as the market power conferred by control of the local loop persists, the only way

to ensure competition in complementary markets like high speed Internet access is to require equal and non-discriminatory access. Without such equal access, sellers will be foreclosed from complementary information services markets.

US WEST makes an unqualified assertion to the contrary, which must be decisively rejected.² It says (Comments at 19-20):

Regulation is not needed to ensure that ISP's can purchase the ability to establish direct "dial up" subscriber connections over a last-mile provider's network. These providers have strong incentives to provide such connections. ... As a commercial matter, US WEST must offer ISPs MegaCentral on reasonable terms, and ensure that they have access to MegaCentral on the same terms as US WEST's own Internet access service, or they will simply turn elsewhere for the product.

As to Salt Lake City Utah, this suggestion is patently false. The Utah Coalition ISP's *have* nowhere else to turn for essential components of DSL access. In part, this is because of the local loop monopoly; in part it is because US WEST has refused to interconnect with CLECs for data transport. Utah Coalition ISPs have had to stand in line for wholesale DSL service for weeks

² The quoted material does not limit the discussion to a particular geographic area; hence US WEST here seems to imply that there is competition across the whole footprint of its DSL deployment. However, these unqualified assertions follow, by several pages, a description of various broad based technologies in Phoenix. The Utah Coalition takes no position on the factual issue of equal access to last mile telecommunications in Phoenix, but wishes to make it very clear that competitors' access to the last mile of the network in Utah is either delayed or unfairly denied.

or months, only some cases only to find that, for example, available capacity on a DSLAM switch has been exhausted.

It is not as if there were any doubt as to what US WEST's access obligations are in principle. As the Commission has stated:

Other offerors of enhanced services would likewise be asked to use such a carrier's facilities under the same terms and conditions [as the carrier provides itself].

AT&T Frame Relay Service, 10 FCC Red 13717, 13725 (1995), citing Computer II, 77 FCC 2d 384, 475 (1980). Moreover, the Commission's recent Advanced Wireline Memorandum Opinion and Order makes this point, that non-discriminatory access is a "continuing obligation".³ The Utah Coalition has not yet seen non-discriminatory access in practice.

However, such access will not, standing alone, protect ISPs that are not themselves CLECs, such as the Utah Coalition ISPs, which are not granted access rights pursuant to Section 251.⁴ Unless such access rights are protected and enforced, the robustly competitive market for Internet access may be choked off as it tries to expand into broadband services while having to

³ See Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC 98-147, FCC No. 98-188 (Aug. 7, 1998) ("Advanced Wireline (Order or NPRM)") ¶37.

⁴ Hence the response to the query in ¶¶ 37 and 49 of the Advanced Wireline NPRM should be to extend these requirements to ISPs.

pass through the bottleneck controlled by ILECs such as US WEST.

III. The Risk of Price Squeeze Underlines the Need for Cost-based Pricing of Bottleneck Services

The Utah Coalition has previously argued that cost-based tariffing is both necessary and appropriate for bottleneck telecommunications services. The Coalition's continuing but incomplete review of US WEST's prices for such services underlines the need for protection against anticompetitive price discrimination by such protections as cost-based rates.⁵ US WEST has offered aggressively low retail prices for DSL, while wholesale prices for upstream services, like data transport (from DSLAM switch to Internet access equipment) are high enough to create the potential for a severe price squeeze for the ISPs.⁶

It is clear that such price squeeze issues are cognizable under this Commission's precedent. In INFONXX, Inc., v. New York Telephone Co., 13 FCC Rcd 3589, 3598, ¶18 (1997) the Commission noted:

[A] price squeeze generally occurs when a vertically integrated company which has monopoly power at the wholesale level, but faces competition from its

⁵ The Coalition's review is necessarily incomplete because the cost data for US WEST is unavailable.

⁶ The Coalition notes that the Commission has asked for comment on the potential for price squeeze in ¶102 of the Advanced Wireline NPRM.

wholesale customers at the retail level, sets its wholesale rates so high that its wholesale customers are unable to compete in the retail market. In certain situations, a price squeeze is evident, such as when a monopolist's wholesale rates exceed retail rates.

[Footnote omitted] The discussion in INFONXX continued a long line of precedent in which the Commission has investigated, remedied, and tried to resolve conditions creating price squeezes.⁷ Moreover, the requirement that administrative agencies address and remedy such abuses is found elsewhere in the federal statutory scheme, including provisions applicable to other wired utilities.⁸

At present the Utah Coalition wishes to reserve further factual argument on this point until it has had a chance to review and analyze the available information more fully.⁹ However, even at this preliminary stage it is clear that a critical part of the potential price squeeze involves US WEST's price for the data transport service, a service which itself has been unlawfully bundled under the Utah tariff with the other non-competitive, local loop component of DSL. This poses a

⁷ See, e.g., In the Matter of International Settlement Rates, 12 FCC Rcd 19806, 19901 ¶¶ 208-09 (1997); RBOC Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II), 100 FCC 2d 1057, 1060 ¶¶ 6-7 (1985)

⁸ In FPC v. Conway Corp., 426 U.S. 271 (1976), the Supreme Court ruled that under the Federal Power Act, FERC (formerly the Federal Power Commission) has the duty to determine whether a utility's wholesale rates are unreasonable or anticompetitive in relation to the utility's state-regulated retail rates, even though the agency is without authority to fix retail rates. FERC may remedy undue price discrimination traceable to the wholesale rate.

⁹ Because much of the information involves confidential cost and market data, a submission under § 0.459 of the Commission's Rules of Practice may be appropriate, as suggested in ¶ 90 of the Section 706 NOI.

grave risk -- control of the local loop is being used to foreclose competition in two markets at once: the data transport service via bundling, and broadband Internet access via what appears to be a price squeeze.

The cost-based tariffs previously proposed may be part of the answer, but other swift and certain remedies should be available. Administrative delay exacerbates market foreclosure. Enforcement procedures like those of the fast-track complaint dockets are justified, so that price squeeze claims may be verified, addressed, and remedied with the expediency needed in fast-moving high technology markets.

IV. Unfair Use of Network Information Must Be Remedied

The Utah Coalition has shown how US WEST has exploited its prior access to network and customer information. Because of the clear anticompetitive advantage conferred by such information, a remedy is needed.

The issue is before the Commission in several dockets. Recently the Commission tentatively concluded that Section 251 disclosure requirements (extending to CLECs) should

supersede Computer III requirements, except that the "all carrier" rule should apply.¹⁰ Once more, ISPs which are not carriers should receive fair and equal treatment and the "Section 251" rights to access information should be available to them as well.

The particulars of loop qualification -- a matter of considerable competitive importance -- are addressed in the Advanced Wireline NPRM at ¶¶157-158. Again, the Utah Coalition submits there should be parity of treatment as between CLECs (discussed there) and ISPs. This is both fair, as between similarly disadvantaged sets of competitors, and reasonable. The Utah Coalition sees no additional burden to making this information available to ISPs as well as to "all carriers".

V. The Anticompetitive Use of Joint Corporate Assets Must Be Addressed and Remedied.

The Utah Coalition has previously pointed out that US WEST has abused three kinds of corporate assets: customer information used to attract US WEST customers to its Internet access affiliate, joint marketing functions (abusive tactics ranging from slamming to discriminatory sales tactics when inquiries are made about DSL services), and the special advantage conferred by US WEST's use of the corporate brand name for its ISP affiliate. Each of these amounts to discriminatory use of the assets of the regulated company.

¹⁰ Computer III Further Remand: Further Notice of Proposed Rulemaking, (Jan. 30, 1998) ("Computer III FNPRM").

Separately and together, these practices have serious anticompetitive effects. They target -- and often reach -- early adopter, business, and other intensive user Internet customers. These are the lucrative customers, who must be attracted to gain market share in high technology services. Just like the reasons for number portability requirements for competitive local telephone service, the cost of shifting providers creates market structural barriers preventing competitors from gaining or regaining the customers lost to these practices.¹¹

There are two types of remedies available. First, there is the reaffirmation of the antidiscrimination "customer neutrality" principle long established in this Commission's jurisprudence, and in the AT&T Consent Decree. Here customer neutrality would require that no ILEC supplying DSL recommend any ISP, specifically including its own, and that the presentation of service alternatives (in sales conversations; brochures and other literature; and on websites, voice mail menus, and the like) be either done randomly or in some other neutral manner.¹²

Another possible remedy would be to require separate affiliate treatment (which the Utah Coalition supported as part of the Retail ISP's Comments in this docket, at pp. 11-12). This

¹¹ Switching costs are magnified by US WEST's anticompetitive "Change Charge". US WEST's DSL price list includes a "MegaSubscriber Change Charge" of \$75.00, a significant negative incentive to change providers. This is nothing more than another barrier to the ISPs' entry into the market for DSL subscribers. US WEST has since reduced the charge to \$45.00. This is still a significant sum: the anticompetitive disincentive remains firmly in place.

¹² The issues are pending in the Computer III Remand and FNPRM. As to the customer information, see ¶¶124-125; as to joint marketing, see id. at ¶¶ 128-129.

approach would extend the 'separate affiliate' option under consideration in the Advanced Wireline NRPM so that DSL-related ISP services may be offered only through a structurally separate affiliate. Several reasons justify taking this path. First, as the experience of the Utah ISPs shows, certain corporate functions in providing DSL create a special, heightened opportunity for discrimination by the incumbent, because of the close relationship between the demand for high speed Internet access and marketing the supply of DSL. Second, because of the nature of these information services, notably the early adopter phenomenon and switching costs, discriminatory marketing practices have serious anticompetitive effects. Third, Section 706 directs the Commission to use pre-competitive tools to promote deployment of broad based and other advanced services. For these reasons, promoting broadband competition in DSL may require nothing less than structural separation.¹³ It bears emphasis that Congress required that many information services be provided by a separate affiliate, see 47 USC 272, and that the issue of whether structural separation should be required for all such information services is pending in the Computer III FNPRM, ¶¶ 43-59.

Two possible RBOC objections to structural separation may readily be met. The RBOCs claim that structural separation sacrifices economies of scope, or is otherwise burdensome. The Utah Coalition recognizes that there will be one-time transaction costs, and the loss of the use of common sales and marketing staff. However, these costs should not be exaggerated. The

¹³ These considerations also preclude transfer of brand names to affiliates, as the Utah Coalition's Comments argued in response to the query at ¶113 of the Advanced Wireline NRPM.

'economy of scope' objection, if pressed too vigorously by the RBOCs, is self-defeating. If sales and marketing staff and overhead are in fact being used widely and heavily by the RBOCs in common with their ISP affiliates, then such large joint costs are presumptively discriminatory vis a vis their competitors. Nor is it clear that end user customers (who will only encounter such joint staff in a single, brief transaction) will stand to gain any benefits from economies of scope for these functions.

These costs do not end the analysis, especially as post-separation cost efficiencies and benefits are considered. It also cannot be taken for granted that structural separation will be more burdensome to administer. The structural separation approach has the virtues of simplicity and clarity, and these virtues would translate into transparency and efficiency when put into practice. Customers and competitors would better know where they stand. Reporting requirements could be reduced; monitoring and oversight would be streamlined. It appears to the Utah Coalition that this approach would reduce ongoing paperwork for both ILECs and Commission staff and reduce transaction costs for the public at large.

Finally, the RBOC's may also argue that separation (or other variants of the non-discrimination principle) may harm "innovation". For example, US WEST's comments in this docket are rife with unsupported assertions that requiring it to treat its competitors fairly will stifle innovation. The contention does not withstand scrutiny. In the first place, as the Retail ISPs' Comments point out (at 5), *this* advanced service -- DSL -- was largely pioneered by ISPs,

not by US WEST or any of its Bell siblings. Moreover, US WEST's actual practice betrays its argument when it points out (Comments at 30) that this broadband technology is available off the shelf: "US WEST buys its advanced data equipment from outside suppliers..." There is nothing particularly innovative about a purchase order. Therefore, the Commission has no basis to find that requiring such purchase orders to come from a truly separate affiliate rather than from an in-house subsidiary will stifle any real world -- as opposed to hypothetical -- innovation.

CONCLUSION

The issues here draw on strands from several different Commission proceedings, going back at least as far as Computer II. Problems of fair and equal access are open issues in many of the proceedings cited in these Reply Comments. Leaving the issues open, however, creates uncertainty and hinders competition in the markets dependent on network access. The Commission should bring these issues to closure.

The Utah Coalition respectfully submits that procompetitive relief is necessary and appropriate:

- *First*, for the data transport segment of high speed DSL-based Internet access, the ILECs such as US West must be barred from foreclosing access to competing local carriers.

- *Second*, for the Internet access segment of high speed DSL-based information services, ILECs must be barred from any form of discrimination favoring their ISP affiliates in the course of selling telecommunications services (such as xDSL). In the alternative, structural separation requirements should be applied to any ILEC ISP affiliate in any case where the ILEC offers an xDSL service to end users.

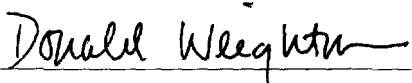
- *Third*, the Commission should require that cost-based tariffs be filed for DSL services to prevent price squeezes. Also, rules should be developed to proscribe price squeezes, and the rules should provide for prompt and certain enforcement.

Our arguments and concerns point to a vision, which, as the Commission has recognized, is much like the vision embodied in the Internet itself. The Utah Coalition ISPs want to compete in a world of equal, non-discriminatory customer and competitor access to the network, and of open and competitively neutral transparency in the provision and use of network information. We believe that the steps suggested above will help to bring that world about.

Respectfully submitted,

Coalition of Utah Independent Internet
Service Providers

By its attorneys



Donald Weightman
510 C Street, N.E.
Washington D.C. 20002
(202) 544-1458

William J. Evans
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street
Suite 1800
Post Office Box 45898
Salt Lake City, Utah
84145-45898
(801) 532-1234

October 8, 1998

CERTIFICATE OF SERVICE

I, Donald Weightman, hereby certify that copies of the foregoing were served on this 8th day of October by hand to the following:

Magalie R. Salas
Secretary
Federal Communications Commission
Room 222
1919 M Street NW
Washington DC 20554
(Original and four copies)

The Honorable William Kennard
Chairman
Federal Communications Commission
1919 M Street NW
Washington DC 20554

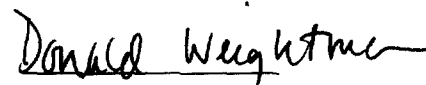
Commissioner Susan Ness
Federal Communications Commission
1919 M Street NW
Washington DC 20554

Commissioner Harold-Furchtgott-Roth
Federal Communications Commission
1919 M Street NW
Washington DC 20554

Commissioner Michael K. Powell
Federal Communications Commission
1919 M Street NW
Washington DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street NW
Washington DC 20554

Larry Strickling
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street NW
Washington DC 20554



Donald Weightman